No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ALFREDA DILLARD, *et al.*,
Petitioners,

v.

JOE FRANK HARRIS AND
GEORGIA DEPARTMENT OF HUMAN RESOURCES,
Respondents.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Section 207(o)(2)(A) of the Fair Labor Standards Act, as amended, defines the limited circumstances under which a public employer is permitted to deviate from the basic FLSA rule that employers must pay employees time and a half for required overtime work. Under § 207(o)(2)(A), a public employer may provide compensatory time in lieu of overtime pay "only pursuant to"

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), [pursuant to] an agreement or understanding arrived at between the employer and employee before the performance of the work. [29 U.S.C. § 207(o)(2)(A).]

Section 207(o)(2) goes on to provide:

> In the case of employees described in [§ 207(o)(2)(A)(ii)] hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). [29 U.S.C. § 207(o)(2).]

The question presented here (upon which there is a conflict among the courts of appeals) is whether Federal rights granted to public employees by § 207(o)(2)(A)(i) are altered by state laws or policies against public-sector collective bargaining agreements so that a public employer may—whenever there are such state laws or policies—refuse to work out a compensatory time agreement or understanding with a representative designated by its employees and then, nonetheless, provide compensatory time in lieu of overtime pay?

PARTIES

Plaintiffs-appellees in the proceeding before the Court of Appeals were—and petitioners in this Court are—Alfreda Dillard, Jim DuVal, Ida Lee, Betty Hogan, Annie Miller, Jacqueline Parham, Doris Cain, Mae Criswell, Ernest Nicholson and Dorothy White for and on behalf of themselves and others similarly situated.

Defendants-appellants in the proceeding before the Court of Appeals were Joe Frank Harris and Georgia Department of Human Resources.

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PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Alfreda Dillard, *et al.*, the plaintiffs in the District Court and the appellees in the Court of Appeals, hereby petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Alfreda Dillard, et al. v. Joe Frank Harris, et al.*, 11th Cir. Nos. 88-8245 & 88-8439 (September 29, 1989).

OPINIONS BELOW

The Court of Appeals' opinion is reported at 885 F.2d 1549 (11th Cir. 1989) and is reproduced as Appendix A (pp. 1a-16a) of the separately bound Appendix to this *certiorari* petition (hereinafter "Pet. App.").

The District Court's opinion and order granting plaintiffs an injunction and a partial summary judgment is reported at 685 F.Supp. 565 (N.D. Ga. 1988) and is reproduced as Appendix B (Pet. App. 17a-25a). The District Court's opinion and order denying defendants' motion for reconsideration and deciding certain related issues is unpublished and is reproduced as Appendix C (Pet. App. 26a-32a).

JURISDICTIONAL STATEMENT

The Court of Appeals' opinion and judgment were entered on September 29, 1989. A timely petition for rehearing was denied by the Court of Appeals on April 18, 1990. A copy of the order denying the petition for rehearing is reproduced as Appendix D (Pet. App. 33a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 207(o)(1) & (2) of the Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C. §§ 207(o)(1) & (2), are reproduced as Appendix E (Pet. App. 34a-35a).

The Secretary of Labor's regulations, set out at 29 C.F.R. § 553.23, are reproduced as Appendix F (Pet. App. 36a-38a). Relevant excerpts from the Secretary of Labor's preamble to these regulations, as set out at 52 Fed. Reg. 2014-15 (January 16, 1987), are reproduced as Appendix G (Pet. App. 39a-41a).

STATEMENT OF THE CASE

1. The Fair Labor Standards Act, as amended, establishes a general rule that employers must pay their employees one and a half times the employee's normal pay for overtime work. *See* 29 U.S.C. § 207(a). FLSA § 207(o), added to the Act in 1985, however, establishes a limited exception to this general rule with respect to *public employers*: such employers may, under certain

stated circumstances, provide "compensatory time"—*viz.*, paid time off—in lieu of the overtime pay that the Act normally requires.

In the regard most pertinent here, § 207(o)(2)(A)(i) states that compensatory time may be provided in lieu of the normally required overtime pay when authorized by the "applicable provisions of a collective bargaining agreement, memorandum of understanding or any other agreement between the public agency and representatives of such employees; . . . ." The statute also specifies that § 207(o)(2)(A)(i) is the *only* way in which a public employer may utilize compensatory time for those employees who are "covered by" that clause. 29 U.S.C. § 207(o)(2).

2. Petitioners—employees of hospitals operated by respondent Georgia Department of Human Resources ("the Department")—designated the Georgia State Employees Association ("the Association") to represent them for the purpose of working out an agreement or understanding with their employer concerning compensatory time. The Department refused even to discuss any such agreement with the Association. Instead, the Department unilaterally required its employees—including petitioners—to accept compensatory time off in lieu of overtime pay.

Petitioners instituted this suit in the United States District Court for the Northern District of Georgia on April 15, 1986, after the Department—despite protests by petitioners—made clear that it would adhere to its position of refusing either to discuss compensatory time arrangements with the Association or to pay overtime compensation to petitioners. Petitioners' Complaint challenged the legality of the Department's requirement that petitioners accept compensatory time off in lieu of overtime pay despite their designation of a representative and despite the absence of any agreement with that representative.

Respondents defended the Department's policy on the basis that Georgia, as a matter of state law, had chosen

not to permit public agencies to enter collective bargaining agreements with public employee labor organizations; therefore, according to respondents, the Department was privileged to utilize compensatory time off in lieu of overtime pay on a unilateral basis regardless of whether its employees designated a representative for purposes of reaching an agreement or understanding on compensatory time.

3. In an opinion dated September 30, 1987, District Judge Richard C. Freeman rejected respondents' interpretation of the statute and granted petitioners partial summary judgment. Pet. App. 17a-25a. The District Court held that once public employees have designated a representative for purposes of reaching an "agreement or understanding concerning comp time," a public employer may only utilize compensatory time off in lieu of overtime pay pursuant to some form of agreement or understanding reached with the designated representative. Pet. App. 22a.

In reaching this conclusion the District Court followed the regulations that the Department of Labor issued to implement FLSA § 207(o)(2)(A). Pet. App. 22a (citing 29 C.F.R. § 553.23). The District Court, found that these regulations "clearly foreclose[d] [respondents'] argument":

> The [Department of Labor's] regulations provide that where the employees have selected a representative, an agreement is required between the employer and the employees' representative as a condition for the use of comp time in lieu of overtime payment in cash. 29 C.F.R. § 553.23(a)(1). "[T]he representative need not be a formal or recognized bargaining agent *as long as the representative is designated by the employees.*" 29 C.F.R. § 553.23(b)(1). [Pet. App. 22a (emphasis by the District Court).]

In a second opinion, dated March 30, 1988, the District Court reaffirmed its earlier ruling, rejecting respondents' motion for reconsideration. In explaining its holding, the

District Court made clear that, although a public employer under the FLSA remains free to refuse to negotiate any agreement or understanding on overtime compensation with a representative designated by its employees, the consequence of such a refusal is that the public employer—like a comparable private employer—must pay overtime. Pet. App. 28a.

4. On appeal, the Eleventh Circuit—in a decision resting on two alternative theories—reversed the District Court.

First, the Court of Appeals recognized that a conflict between the Fourth and Tenth Circuits existed regarding the proper construction of FLSA § 207(o)(2)(A) and stated its agreement with the Fourth Circuit position. *See* Pet. App. 2a (citing *Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989) and *Local 2203 v. West Adams County Fire Dist*, 877 F.2d 814 (10th Cir. 1989)). In the Eleventh Circuit's view—which the court below attributed to the Fourth Circuit as well—employees may only designate representatives if state law permits public-sector collective bargaining agreements. Pet. App. 2a. Having taken that view, the Eleventh Circuit "refuse[d] to follow the Tenth Circuit case," which had adopted substantially the same view of § 207(o)(2)(A) as the District Court in this case. Pet. App. 2a.

Second, the Court of Appeals also endorsed "an alternative approach" to FLSA § 207(o)(2)(A) which—although quite different from the Fourth Circuit's approach in *Abbott*—the Eleventh Circuit viewed as "[e]qually satisfactory." Pet. App. 7a. According to the Eleventh Circuit, under the clear statutory language of § 207(o)(2)(A), an employee's designation of a representative has no legal effect until the public employer reaches a § 207(o)(2)(A)(i) agreement with that representative. Thus, regardless of the employee's designation of a representative, the employer remains free to require compensatory time in lieu of overtime under § 207(o)(2)(A)(ii)

unless the employer chooses to enter a contrary agreement with such representative. Pet. App. 11a.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CIRCUIT CONFLICT REGARDING THE PROPER APPLICATION OF THE FLSA'S OVERTIME PROVISIONS TO PUBLIC EMPLOYERS AND PUBLIC EMPLOYEES

The Fair Labor Standards Act originally applied only to private-sector employers and employees. Beginning in 1966, Congress has expanded the coverage of the FLSA's protective provisions—including its overtime compensation provisions—to include state and local government employees such as petitioners.[1]

Congress' assertion of Commerce Clause power to set minimum labor standards for the state and local government sector has raised a contentious federalism dispute. *See, e.g., Maryland v. Wirtz*, 392 U.S. 183 (1968) (upholding constitutionality of 1966 expansion of FLSA coverage to state and local governments); *National League of Cities v. Usery*, 426 U.S. 833 (1976) (overruling *Wirtz* and holding expansions of FLSA coverage to state and local governments to be, in large part, unconstitutional); *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 328 (1985) (overruling *Usery* and upholding constitutionality of FLSA coverage of state and local governments).

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[1] The 1966 amendments applied the FLSA to state and local schools and hospitals. 80 Stat. 831. In 1974, Congress amended the FLSA again, bringing virtually all state and local government employees within the general coverage of the FLSA and (subject to limited exceptions not relevant here) within the specific coverage of the Act's overtime provision, 29 U.S.C. § 207(a). 88 Stat. 58, 60.

With regard to overtime, the FLSA provides that employees covered by the Act, and not otherwise specifically exempted, are entitled to be paid for all overtime hours worked "at a rate not less than one and one-half times [their] regular rate." 29 U.S.C. § 207(a).

At least in part this dispute has stemmed from the concern that Congress could not—or would not—recognize and give adequate consideration to the special attributes of state and local governments and the special character of the public employer-public employee relationship. The 1985 Congress responded to this Court's *Garcia* decision by amending the FLSA insofar as that Act applies to the public sector and did so in a manner designed to *negate this concern*. *See* Fair Labor Standards Amendments Act of 1985, P.L. 99-150, 99 Stat. 790.

Before acting, Congress consulted fully both with public employers and public employees in a process designed to ascertain and accommodate their basic interests and needs. And to further the interest in certainty and stability in the law in this important area of federal-state relations, Congress mandated that the Department of Labor promulgate regulations to assure the proper and orderly implementation of the new provisions. P.L. 99-150, § 6.

Nonetheless, deep disagreements have developed as to the scope of one of the most important provisions of the 1985 Act: *viz.*, the provision requiring public employers who desire to provide compensatory time in lieu of overtime pay to reach an agreement to that effect with representatives designated by their employees. In the five years since that provision—FLSA § 207(o)(2)(A)(i)—became law, four courts of appeals have had occasion to pass on the interplay between this federal law and state laws governing collective bargaining agreements between public employers and public employees. Each court has given § 207(o)(2)(A)(i) a different reading.

The result of these differing approaches is that there are at least four different legal tests for determining when public employees may enjoy the federal overtime rights provided by 29 U.S.C. § 207(o)(2)(A)(i), and when—in those 15 states covered by these circuit courts that do not specifically provide for public sector collective

bargaining—public employees' overtime rights are instead determined by state law.[2]

Put simply, there is a clear and patent conflict among the circuits so that the rights and duties of public employees and public employers with respect to overtime compensation now vary widely depending on the circuit in which the employment occurs. Given the manifest importance—and delicacy—of the resulting question presented here, this *certiorari* petition should be granted.

A. The Background

1. After this Court's *Garcia* decision, many public employers and their organizations argued to Congress that the costs of FLSA coverage would seriously injure their ability to function effectively. In the resulting hearings held by the relevant House and Senate committees, public employees and their representatives made the contrary argument; *viz.*, that compliance with *Garcia* would not be excessively costly and that it was only fair for public employees to enjoy the same minimum labor standards as virtually all private employees.[3]

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[2] According to a 1987 survey of state public-employee relations laws, 24 states have *not* adopted comprehensive collective bargaining statutes governing public-sector employees. *See* BNA, *Daily Labor Report*, No. 59 (March 30, 1987), at page A-2 (summarizing 50-state survey by AFL-CIO Public Employee Department); *see also* BNA, *Government Employee Relations Report*, Vol. 25, No. 1206 (March 23, 1987), at page 407 (same). Thus, the 15 states that do not have public sector collective bargaining statutes and that are within the four circuits that have already dealt with the issue presented in this case (the Fourth, Ninth, Tenth and Eleventh Circuits), represent a substantial majority of those states in which the issue in this case may arise.

[3] For a summary of public employer complaints regarding the costliness of FLSA coverage, see generally *Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, Fair Labor Standards Amendments Act of 1985*, 99th Cong., 1st Sess. (1985), at 1-2 (testimony by Sen. Nickles explaining efforts to remove public employers from FLSA coverage in response to arguments by public employers and their organiza-

To avoid a legislative deadlock, the public-employer and public-employee groups met and proposed a bill which was the product of intense negotiations between—and extensive compromises by—all the affected parties.[4] This compromise bill was supported by such diverse groups as "the U.S. Conference of Mayors, the National League of Cities, the National Conference of State Legislators, the AFL-CIO and the Fraternal Order of Police." 131 Cong. Rec. S14047 (October 24, 1985) (Sen. Nickles); *accord* 131 Cong. Rec. H9238 (October 28, 1985) (Rep. Hawkins). And, with such broad support, the bill was quickly passed by Congress.

2. One of the subjects of compromise concerned the circumstances under which a public employer could provide compensatory time in lieu of overtime pay. As we have noted, the relevant text of § 207(o)(2)(A) provides that a public employer may provide compensatory time in lieu of overtime pay "only pursuant to"

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tions); *id.* at 503-504 (testimony of Secretary of Labor Brock summarizing same history). For the contrary arguments of public employee organizations, see *id.* at 157 (AFL-CIO Public Employee Department); *id.* at 164-185 (International Association of Fire Fighters ("IAFF")); *id.* at 186-201 (Service Employees International Union); *id.* at 375-377 (Professional Fire Fighters of Oklahoma); *id.* at 561-562, 568-569, 574-576 (National Association of Police Organizations); *id.* at 562-567 (Fraternal Order of Police); *id.* 569-571 (National Troopers Coalition); see also *Hearings Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, Fair Labor Standards Amendments Act of 1985*, 99th Cong. 1st Sess. (1985), at 85-108 (American Federation of State, County and Municipal Employees); *id.* at 109-128 (IAFF); *id.* at 129-140 (SEIU); *id.* at 151-154 (Amalgamated Transit Union); *id.* at 155-164 (International Union of Police Associations); *id.* at 179-180 (IAFF); *id.* at 236-240 (American Federation of Teachers).

[4] *See, e.g.*, 131 Cong. Rec. S14047 (October 24, 1985) (Sen. Nickles) (the final Senate bill "is different from the bill I originally introduced and represents a compromise among the affected parties"); 131 Cong. Rec. H9916 (November 7, 1985) (Rep. Hawkins) ("bipartisan efforts" and "compromise" produced the 1985 FLSA amendments).

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), [pursuant to] an agreement or understanding arrived at between the employer and employee before the performance of the work. [29 U.S.C. § 207(o)(2)(A).]

The section goes on to provide:

> In the case of employees described in [§ 207(o)(2)(A)(ii)] hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). [29 U.S.C. § 207(o)(2).]

3. As noted above, when it passed the 1985 FLSA amendments, Congress provided for implementing Department of Labor regulations. The Labor Department, therefore, conducted an extensive rulemaking proceeding, and, pursuant to Congress' command—after soliciting and carefully considering the views of all affected parties, including state and local governments and public employees—the Department issued detailed regulations. *See* 52 Fed. Reg. 2012 (1987); 29 C.F.R. §§ 553.20-553.28. Those regulations explained that, under § 207(o), "a condition for the use of [any] compensatory time in lieu of overtime payment in cash" is that there be "an agreement or understanding [regarding compensatory time] reached prior to the performance of work," and that, "where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency." Pet. App. 36a-37a. The regulations also explain that apart from situations involving collective bargaining agreements, "the representative need not be a formal or recognized bargaining agent as long as the

representative is designated by the employees." Pet. App. 37a.

B. The Differing Court of Appeals Readings of FLSA § 207(o)(2)(A)

1. The first court of appeals to interpret FLSA § 207(o)(2)(A) was the Tenth Circuit. *Local 2203 v. West Adams County Fire District*, 877 F.2d 814 (10th Cir. 1989). The West Adams Fire District—asserting the right under Colorado law of a local government employer to refuse to bargain collectively with labor organizations—had refused to enter into a § 207(o)(2)(A)(i) compensatory time agreement or understanding with the reprensentative that had been designated by its employees, but nevertheless insisted on utilizing compensatory time in lieu of overtime pay. The employer argued that state law right precluded its employees from designating a representative under § 207(o)(2)(A)(i), and that the employer was therefore free under § 207(o)(2)(A)(ii) to follow its past practices regarding compensatory time regardless of its employees efforts to designate a representative.[5]

The Tenth Circuit rejected these arguments, concluding that under the FLSA, once employees designate a representative for purposes of reaching a § 207(o)(2)(A)(i) agreement or understanding, a public employer may only provide compensatory time in lieu of overtime pay pursuant to some form of agreement or understanding with the employees' designated representative. 877 F.2d at 820. Section 207(o)(2)(A)(ii)'s permission to provide compensatory time pursuant to individual agreements or past practices, said the Tenth Circuit, applies *only* where the employees in question have *not* designated

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[5] Under Colorado law, local governmental entities generally have a right to refuse to engage in collective bargaining. *See Littleton Education Ass'n v. Arapaho County School District No. 6*, 191 Colo. 411, 553 P.2d 793 (1976).

a representative. *Id.* The Tenth Circuit recognized, of course, that a public employer is under no obligation to reach an agreement or understanding with—or even engage in any discussions with—its employees' representatives; but, said that court, the consequence of the employer's refusal is that the employer must, like other employers, pay overtime for required overtime work. 877 F.2d at 820 n.7.

In reaching its conclusion, the Tenth Circuit principally relied on the Department of Labor's regulations on § 207(o)(2)(A) which state in pertinent part as follows:

> Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency . . . . In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. [29 C.F.R. § 553.23(b)(1) (*quoted at* 877 F.2d at 817).]

This regulation, the Tenth Circuit concluded, makes two points irrefutable:

> *First*, if employees have a representative, an employer may use compensatory time only pursuant to an agreement between the employer and the representative. *Second*, employees are deemed to be represented under section 207(o) if they merely designate a representative; the representative need not be recognized by the employer. [877 F.2d at 818 (emphasis added).]

In evaluating this administrative construction of the statute, the Tenth Circuit undertook two inquiries: (a) is the statutory language ambiguous; and (b) is the administrative construction a reasonable resolution of the ambiguity in light of the statute's language and history. That court answered both inquiries "yes."

As to the "ambiguity of statutory language" issue, the Tenth Circuit stated as follows:

> We find the language of section 207(o) to be ambiguous. Subclause (ii) applies to "employees not covered by subclause (i)." However, given the wording of subclause (i), it is unclear whether this means employees who do not have a representative, or employees who are not subject to an agreement reached with a representative. [877 F.2d at 816-817; *see also id.* at 817 n.1.]

Given this ambiguity, the Tenth Circuit followed this Court's instructions in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), recognizing that "the Department's construction of the Section, if reasonable, is controlling even if there is an equally reasonable construction." 877 F.2d at 817.

As to the "reasonableness of the administrative construction" issue the Tenth Circuit looked to the relevant legislative history and found the following:

First, the Tenth Circuit noted that all relevant legislative history materials support the Labor Department's view that § 207(o)(2)(A)(ii) only applies where the employees have *no* representative. *See* 877 F.2d at 819 (*quoting* S. Rep. No. 99-159, 99th Cong., 1st Sess. 10-11 (1985) and H.R. Rep. No. 99-331, 99th Cong., 1st Sess. 20 (1985)).

Second, the Tenth Circuit found that the Labor Department's view on the issue of when employees have a representative is also reasonable. Although there were "variations in the reports of the two houses of Congress", 877 F.2d at 820, the Labor Department's interpretation is based on, and is fully supported by, the House Report, which stated as follows:

> Where employees have *selected* a representative, which *need not be a formal or recognized collective bargaining agent*, as long as it is a representative designated by the employers, the agreement or understanding must be between the representative and the employer. [H.R. Rep. No. 99-331, *supra*, at 20 (*as quoted at* 877 F.2d at 820 (emphasis added by court).]

"[B]ecause of the support of the House report," the Tenth Circuit concluded, the Labor Department "reasonably determined that employees are represented if they have merely designated a represntative whom the employer has failed to recognize." 877 F.2d at 820.

2. The Fourth Circuit issued its decision in *Abbott v. City of Virginia Beach*, 879 F.2d 132 (1989), *cert. denied*, —— U.S. —— (1990), shortly after the Tenth Circuit's *West Adams* decision. In *Abbott*, the Fourth Circuit adopted an interpretation of § 207(o)(2)(A) that simply cannot be reconciled with that of the Tenth Circuit.

In its *Abbott* decision, the Fourth Circuit rejected a challenge by 126 police officers, two labor organizations, and the officers of those organizations to the Virginia Beach Police Department's overtime compensation policies. The police officers had designated the labor organizations and the organizations' officers as their representatives for purposes of working out an agreement or understanding on compensatory time; but the employer had refused to reach any agreement or understanding with those representatives. The employer instead adopted a policy under which each individual police officer could choose whether to receive compensatory time or overtime pay after performing any required overtime work. The employer asserted that, because Virginia law "prohibits [a public employer] from collectively bargaining with representatives of its employees," all cases in Virginia are governed by § 207(o)(2)(A)(ii)—not § 207(o)(2)(A)(i)—so that the employer had authority to adopt the policy at issue. 879 F.2d at 133.

Like the Tenth Circuit, the Fourth Circuit accepted the proposition that, where employees have a representative, a public employer may only provide compensatory time pursuant to an agreement or understanding with the employees' representative. And like the Tenth Circuit, the Fourth Circuit recognized that the relevant

"legislative history is contradictory" on the issue of whether recognition by the public employer of the representative chosen by its employees is necessary before the employees may be deemed to have a representative. 879 F.2d at 135. The Fourth Circuit, however, concluded that the Secretary of Labor's position on the relevant issues is also "confusing." *Id.*

Against this background, the Fourth Circuit's *Abbott* opinion focused on two factors: first, that Virginia state law does not permit public employee collective bargaining, and, second, that the public employer here had allowed each employee required to work overtime an absolute choice between overtime pay and compensatory time (albeit without reaching a § 207(o)(2)(A)(i) agreement with the representative that the affected employees had designated pursuant to that provision).

Regarding the relevance of the state-law status of collective bargaining, the Fourth Circuit quoted language in the preamble of the Labor Department's regulations stating:

> The Department believes that the proposed rule accurately reflects the statutory requirement that a [collective bargaining agreement], memorandum of understanding or other agreement be reached between the public agency and the representative of the employees where the employees have designated a representative. . . . The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section [207(o)] shall be determined in accordance with State or local law and practices. [52 Fed. Reg. 2012, 2014-15 (1987) (*as quoted* 879 F.2d at 136).]

On the basis of the foregoing, the Fourth Circuit concluded that § 207(o)(2)(A)(i) should not be construed —where state law prohibits public sector collective bargaining agreements—to require public employers to reach

any agreements or understandings with the employees' representatives as a condition of providing compensatory time. 879 F.2d at 136.[6]

The Fourth Circuit then concluded that, given the state law rule against public sector collective bargaining agreements, Virginia Beach's policy of offering individual employees a choice of overtime pay or compensatory time sufficiently conformed to the underlying policies of § 207 (o)(2)(A), which that court described as "provid[ing] flexibility to state and local government employers and an element of a choice to their employees regarding compensation for statutory overtime hours worked by covered employees." 879 F.2d at 136-137 (*quoting* H.R. Rep. No. 99-331, *supra*).[7]

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[6] As we discuss at pp. 22-26, *infra*, the Fourth Circuit did not cite or discuss other portions of the preamble or the portions of the regulations itself which belie that court's reading of the regulation, nor did the Fourth Circuit explain why the state law status of public-sector collective bargaining agreements is determinative when § 207(o)(2)(A)(i) explicitly permits agreements and understanding far less formal or enforceable than those associated with full collective bargaining. *See*, 29 U.S.C. § 207(o)(2)(A)(i) (allowing a "memorandum of understanding or any other agreement between the public agency and representatives" as alternatives to a collective bargaining agreement); 29 C.F.R. 553.23(b)(1) (allowing a "memorandum of understanding or other type of oral or written agreement" as alternatives to a collective bargaining agreement).

[7] The Fourth Circuit distinguished the Tenth Circuit's *West Adams* decision on the ground that *West Adams* "did not involve a situation where . . . a public employer, who was prohibited by state law from contracting with employee representatives, gave each employee an absolute choice of whether to accept compensatory leave in lieu of money." 879 F.2d at 136.

To the extent that the Fourth Circuit intended to distinguish Virginia law's across-the-board prohibition on public-sector collective bargaining agreements from Colorado law's delegation to local governments of the right to choose between permitting or prohibiting collective bargaining (*see id.* n.4), the Fourth Circuit did not explain why a state decision to prohibit collective bargaining should operate to alter the scope of § 207(o)(2)(A)(i), while a state decision to delegate that decision to a local government should not.

3. At the outset of the decision below, the Eleventh Circuit recognized that there is a clear conflict between the Tenth Circuit's *West Adams* decision and the Fourth Circuit's *Abbott* decision. The Eleventh Circuit then expressly "refuse[d] to follow the Tenth Circuit case" and stated its "agree[ment] with the analysis" of the Fourth Circuit. Pet. App. 2a.

Like the Fourth Circuit, the decision below relied on the language in the preamble to the Labor Department's regulations for the proposition that "a wide variety of State law . . . may be pertinent" in determining whether employees have a representative. Pet. App. 14a (*quoting* 52 Fed. Reg. 2014-15). And like the Fourth Circuit, the court below concluded, with little explanation, that this language should be construed as meaning that a state law prohibtion on public-sector collective bargaining agreements must be understood as precluding *any* type of agreements or understandings between public employers and employee representatives that could be covered by § 207(o)(2)(A)(i). Pet. App. 14a.[8]

Although in these respects the decision below is clearly in conflict with *West Adams* and in agreement with *Abbott*, in other respects the opinion below is in substantial conflict with the *Abbott* decision as well.

First, as the decision below recognized, "in *Abbott* the public employer . . . gave each employee an absolute choice of whether to accept compensatory leave in lieu of money." Pet. App. 15a. Indeed, *Abbott* found this fac-

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[8] As we develop at pages 22-26, *infra*, in reaching this conclusion the Eleventh Circuit failed to recognize the importance of the fact that § 207(o)(2)(A)(i) expressly permits an informal "memorandum of understanding" in the absence of formal collective bargaining agreements. Even in states which prohibit public-sector collective bargaining, informal and non-binding agreements and understandings between public employers and employee representatives are well accepted. *See* pages 22-24, *infra*.

tor dispositive because, in that court's view, § 207(o)(2)(A) demands that there be "an element of choice to [public] employees regarding compensation for statutory overtime hours worked." 879 F.2d at 136. In contrast, the employer here gave employees *no choice at all, having unilaterally adopted a policy of no overtime pay.* The Eleventh Circuit deemed this distinction irrelevant because, in its view, § 207(o)(2)(A) is best construed as "giv[ing] the state agencies the upper hand in [the] decision" of whether overtime will be paid. Pet. App. 15a. In this respect, the Eleventh Circuit's view is in stark conflict with that of the Fourth.

Second, and equally to the point, the Eleventh Circuit declined to rest on the Fourth Circuit's understanding of the basic statutory structure. Instead, the Eleventh Circuit endorsed "an alternative approach" (Pet. App. 2a) that, in the view of the court below, is "[e]qually satisfactory" for resolving disputes over employee rights. Pet. App. 7a. Specifically, the Eleventh Circuit took the view that under the "plain language" of the statute, § 207(o)(2)(A)(i) applies only where an agreement allowing for compensatory time *has already been reached* between an employer and a representative; in all other situations, whether or not the employees have designated a representative, the employer is free to implement compensatory time programs under § 207(o)(2)(A)(ii).

This position is, of course, in direct conflict with both *West Adams* and *Abbott*. Each of those decisions accepted that where employees have a representative, the employer must reach an agreement with that representative or pay overtime; the only point of disagreement was over when employees can be said to have a representative. Indeed, the Eleventh Circuit's position conflicts with *all* of the relevant administrative and legislative materials, which uniformly confirm that whenever an employee has a representative, an agreement or understanding with

that representative is a precondition to the employer's use of compensatory time. *See* 29 C.F.R. § 553.23(b)(1); S. Rep. No. 99-159, *supra*, at 10-11; H.R. Rep. No. 99-331, *supra*, at 20. *See generally West Adams*, *supra*, 877 F.2d at 819.

4. The most recent court of appeals' decision concerning § 207(o)(2)(A)(i) is *Nevada Highway Patrol Association v. Nevada*, 899 F.2d 1549 (9th Cir., 1990), which involved a challenge by state police officers to a state police policy of permitting overtime pay only when adequate funding was made available and otherwise requiring that employees accept compensatory time.

The *Nevada Highway Patrol Association* decision begins, like the *West Adams* and *Abbott* decisions, by accepting that once employees have a representative, § 207(o)(2)(A)(i) permits compensatory time only through an agreement or understanding between the employer and the representative. 899 F.2d at 1552-1553.[9] But the Ninth Circuit then followed *Abbott* and *Dillard* in holding that state law must play a role in determining whether employees may have a representative. 899 F.2d at 1554.

At that critical juncture, however, the Ninth Circuit's decision deviated from *Abbott* and *Dillard*, *sub silentio*, by rejecting the proposition—which those cases accepted—that a state law prohibition of public-sector collective bargaining is sufficient to render § 207(o)(2)(A)(i) inapplicable. Recognizing that § 207(o)(2)(A)(i) does not require full collective bargaining—but instead gives

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[9] The Ninth Circuit mistakenly believed that the court of appeals in the instant case had also accepted this proposition. *See* 899 F.2d at 1552. As we have shown, however, the court below, under its "alternative approach," took the view that under the statute's clear language "the presence or absence of an agreement [and not the presence or absence of a representative] is the factor determining whether employees are 'not covered by subclause (i).'" Pet. App. 10a.

effect to quite informal agreements and understandings—the Ninth Circuit explained, that:

> even if formal collective bargaining were prohibited, we find no Nevada law supporting the proposition that . . . [employees] cannot designate representatives to enter into agreements or understandings with their employers. [899 F.2d at 1554 n.6.]

On this basis—and on the basis that a Nevada state legislative resolution had recognized a particular labor organization's history of "represent[ing] its members for discussion of conditions of employment" with the state (albeit not in the context of collective bargaining)—the court of appeals reversed the district court's dismissal of the complaint and remanded for further proceedings. 899 F.2d at 1554-1555.

Thus, the Ninth Circuit's *Nevada Highway Patrol Association* decision states yet another distinct construction of § 207(o). In conflict with the Eleventh Circuit's treatment of the instant case, the Ninth Circuit recognizes that, even where collective bargaining agreements are prohibited by state law, informal agreements and understandings are sufficient under § 207(o)(2)(A)(i).

* * * *

As the foregoing makes clear, the decisions of the Tenth, Fourth, Eleventh and Ninth Circuits on the meaning of § 207(o)(2)(A) leave the law in total disarray.

In the Tenth Circuit, public employees have a clear federal right to designate representatives to work out agreements or understandings covered by § 207(o)(2)(A)(i). Regardless of state law or practices concerning public employee collective bargaining agreements, if the public employer does not reach some meeting of the minds with these representatives, the public employer must—like other employers—pay overtime. *See* pages 11-14, *supra*.

In the Fourth and Eleventh Circuits, state law concerning public-employee collective bargaining is of significant—although not the same—import. The Fourth Circuit has ruled that state prohibitions on public-sector collective bargaining agreements empower the employer to offer individual employees a choice between overtime or compensatory time after the work is performed, without regard to whether the employees have designated a representative. *See* pages 14-16, *supra*. The Eleventh Circuit has broadly declared that the effect of such state law prohibitions is to entirely remove public employers from the coverage of § 207(o)(2)(A)(i), so that such a public employer may unilaterally deny overtime pay based on past practices. *See* pages 17-18, *supra*. Moreover, the Eleventh Circuit has alternatively declared that, no matter what the state law on public sector collective bargaining agreements may be, employers are empowered to act without regard to designated employee representatives whenever no contrary agreement or understanding with such representatives is in effect. *See* pages 18-19, *supra*.

The Ninth Circuit occupies a middle ground. That court regards state law as significant in determining whether public employees may have a representative under § 207(o)(2)(A)(i), and who that representative may be. But the Ninth Circuit, in contrast to the Fourth and Eleventh Circuits, has made it clear that state *collective bargaining law* is *not* determinative since understandings of far less formality or enforceability than collective bargaining agreements are fully sufficient to qualify as § 207(o)(2)(A)(i) arrangements. *See* pages 19-20, *supra*.

Given this disarray in the lower courts, this Court's guidance is urgently required.

II. THE DECISION BELOW IS NOT ONLY IN CONFLICT WITH OTHER DECISIONS, IT IS IN CONFLICT WITH FLSA § 207(o)(2)(A)(i)

The Eleventh Circuit's decision here is not only inconsistent with the decisions in other circuits regarding the meaning of FLSA § 207(o)(2)(A); as we now show, that decision is also inconsistent with the statutory provision itself. As we have discussed, the Eleventh Circuit rested its judgment on "alternative approach[es]" that, in its view, "reache[d] the same result." Pet. App. 2a. Both of those approaches are fundamentally flawed.

1. The decision below states that petitioners had no right to designate a § 207(o)(2)(A)(i) representative because Georgia state law prohibits public employers from entering collective bargaining agreements—and therefore prohibits public employers from entering into agreements or understandings under § 207(o)(2)(A)(i)—and because Congress intended that such state law prohibitions be determinative in assessing whether the action of public employees in designating a representative is to be given legal effect. The Eleventh Circuit's position in this regard rests on a patent *non sequitor*

a. The relevant statutory and regulatory materials make clear that formal and binding collective bargaining agreements are *not* the only means of complying with § 207(o)(2)(A)(i). In the statute's words, compensatory time may be authorized pursuant to "applicable provisions of a collective bargaining agreement" *or pursuant to a "memorandum of understanding, or any other agreement between the public agency and representatives of such employees."* § 207(o)(2)(A)(i) (emphasis added).

The Labor Department's regulations also emphasize that far less formal or binding arrangements than collective bargaining agreements are fully sufficient for § 207(o)(2)(A)(i) purposes:

> [T]he agreement or understanding . . . [may be] through a memorandum of understanding or other type of oral or written agreement . . . [and, in] the

> absence of a collective bargaining agreement . . . , the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. [Pet. App. 44a (29 C.F.R. § 553.23(b)(1)).]

In allowing for these less formal and less binding types of understandings, Congress recognized the diversity of labor relations practices that exist in states in which formal and binding collective bargaining agreements are prohibited by state law. *See, e.g., Nichols v. Bolding*, 277 So.2d 868, 873 (Alabama 1973) (prohibition of public-sector collective bargaining not inconsistent with agency's approval of "memorandum of understanding" which notes that administratively adopted policy was result of agreement with union); *Walker Co. Board of Education v. Walker Co. Educ. Ass'n.*, 431 So.2d 948, 954-955 (Alabama 1983) (same); *Board of Education v. Scottsdale Educ. Ass'n.*, 498 P.2d 578 (Ariz. App. 1972) (prohibition of public-sector collective bargaining not inconsistent with agency's negotiation of model contract for union's members or agency's entering agreement with union that would bind all consenting union members, so long as agreement "contains no terms . . . which could not be included in a standard contract for individual" employees); *State Board v. United Packinghouse Workers*, 175 N.W.2d 110, 113 (Iowa 1970) (prohibition of public-sector collective bargaining not inconsistent with agency's negotiation of terms of public employment with union or with agency's adoption of agreed-upon terms as administrative rule or legislative enactment).

It is thus of particular significance to this case that such public sector labor relations arrangements *have been recognized as legal and proper by the Georgia Attorney General*, who, in a 1975 official position statement for use by Georgia public employers, relied on and quoted from many of the state cases cited above. *See Legal Status of Public Employee Labor Organizations in Georgia*, Op. Ga. Att'y Gen., 75-457 (1975) at 463-465 (reprinted at Pet. App. 51a-53a).

The decision below noted the 1975 Georgia Attorney General's opinion, but asserted that the sort of informal arrangements endorsed therein could not constitute "an 'agreement' or 'memorandum of understanding' between the agency and a representative, as required by 29 U.S.C.A. § 207(o)(2)(A)(i)." Pet. App. 14a.

In this regard, the Eleventh Circuit committed plain error. As the Ninth Circuit recently noted, "even if formal collective bargaining [is] prohibited . . . representatives [can still] enter into agreements or understandings with . . . employers." *Nevada Highway Patrol Association*, *supra*, 899 F.2d at 1554 n.6.

b. The Eleventh Circuit asserted too that the preamble to the Labor Department's regulations supports the proposition that § 207(o)(2)(A)(i) is not intended to apply where state law prohibits public-sector collective bargaining agreements. But the preamble language in question—*viz.*, that "the question of whether employees have a representative for purposes of FLSA [§ 207(o)] shall be determined in accordance with state or local law and practices" (Pet. App. 14a)—does not support that proposition.

During the comment period regarding the Labor Department's *proposed* regulation, numerous public employers challenged and sought to change the proposed language of 29 C.F.R. § 553.23(b)(1), which stated that "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." These commentators made the same argument that respondents make in this case—and that the court below accepted—*viz.*, that § 207(o)(2)(A)(i) should have no application where state law fails to recognize public-sector collective bargaining agreements. Pet. App. 40a. In issuing its final regulations, however, the Labor Department refused to alter the language of the proposed rule. As the final regulation states:

> The Department believes that the proposed rule accurately reflects the statutory requirement that a CBA [collective bargaining agreement], *memorandum of understanding, or other agreement* be reached between the public agency and the representative of the employees where the employees have designated a representative. [Pet. App. 40a-41a (52 Fed. Reg. 2014-2015) (emphasis added).]

Indeed, the preamble's next paragraph explicitly states that "collective bargaining is not a necessary condition for establishing" a § 207(o)(2)(A)(i) agreement or understanding. Pet. App. 41a (52 Fed. Reg. 2015).

In light of this, the Eleventh Circuit was wrong in taking the preamble's mention of pertinent "state or local law and practices" as a reference to state law prohibitions on public-sector collective bargaining agreements. As noted, the Labor Department made clear that state prohibitions on public sector collective bargaining do *not* preclude employees from designating a representative under § 207(o)(2)(A)(i). At the same time, in the language cited by the Eleventh Circuit, the Labor Department recognized the commonplace that state laws and practices may nevertheless be relevant to the FLSA's operation. Where state law or practice recognizes some concept of exclusive representation, for example, state law might be highly relevant on the issue of whether a given employee has a representative and who that representative is. *Cf.* Pet. App. 40a-41a (52 Fed. Reg. 2015) (quoting commentator's concern that "an employer could find itself dealing with a different representative for each employee"). *Cf. also Nevada Highway Patrol Association*, *supra*, 899 F.2d at 1554-1555 (interpreting Nevada law as granting exclusive representative status to particular labor organization).

This understanding of the Secretary's preamble was, quite properly, adopted by the District Court, which recognized that:

> The Department's statement that "whether employees have a representative for purposes of [§ 207 (o)(2)(A)] shall be determined in accordance with state or local law and practices" was made in the context of determining whether employees who have a labor representative pursuant to a collective bargaining agreement could designate a different representative, in violation of the bargaining agreement, to represent them on the issue of overtime. [Pet. App. 29a.]

2. As we have already shown, the Eleventh Circuit's "alternative approach" is also without merit. *See* pages 18-19, *supra*. That court stated that "the presence or absence of an agreement [and not the presence or absence of a representative] is the factor determining whether" an employer may rely on § 207(o)(2)(A)(ii) to impose compensatory time programs. Pet. App. 9a-10a. That understanding is in direct conflict with Congress' understanding of the statute, as reflected in both the Senate and House reports. *See* S.Rep. No. 99-159, *supra*, at 10-11; H.R. Rep. No. 99-331, *supra*, at 20. It is also in direct conflict with the clearly expressed understanding of the Secretary of Labor, as reflected in the Secretary's regulations. *See* Pet. App. 37a (29 C.F.R. § 553.23(b)(1)).

CONCLUSION

For the above stated reasons, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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